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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LIQUIDATION ESTATE OF
DE LAURENTIIS ENTERTAINMENT GROUP INC.,
Petitioner,

v.

TECHNICOLOR, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an action to recover an avoidable preference is timely under 11 U.S.C. § 546(a)(1) when brought by an estate representative within two years of its appointment under 11 U.S.C. § 1123(b)(3)(B), but more than two years after the commencement of the bankruptcy case, and no trustee has been appointed.

LIST OF PARTIES AND RULE 29.6 LIST

All of the parties to this proceeding are listed in the caption of this petition.

Petitioner has no parent companies or non-wholly owned subsidiaries.

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Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

The Liquidation Estate of De Laurentiis Entertainment Group Inc. ("Liquidation Estate") hereby petitions this Court pursuant to 28 U.S.C. § 1254(1) for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the court of appeals is reported at 87 F.3d 1061 (9th Cir. 1996), and is reprinted in the Appendix ("App.") at 1a-6a. The district court's decision

is reprinted at App. 7a-16a. The Bankruptcy Court's decision is reprinted at App. 17a-23a.

JURISDICTION

The court of appeals entered judgment on June 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is Section 546(a) of the Bankruptcy Code, 11 U.S.C. § 546(a). This provision is set forth at App. 24a-30a.

STATEMENT OF THE CASE

This is an action brought by the Liquidation Estate to recover a $3.7 million preferential payment by De Laurentiis Entertainment Group Inc. ("DEG") made to Technicolor, Inc. one month before DEG filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code.

DEG, a publicly owned motion picture production, financing and distribution company, filed its Chapter 11 petition on August 16, 1988. ER 6 at 38.[1] Until its plan of reorganization was confirmed by the Bankruptcy Court, DEG continued to operate its own affairs as debtor in possession pursuant to 11 U.S.C. §§ 1107, 1108.[2] No trustee was ever appointed, and the bankruptcy case has not been dismissed or closed.

The Bankruptcy Court entered an order confirming DEG's plan of reorganization (the "Plan") on May 3, 1990. ER 1. The Plan provided for, among other things, the creation and appointment of a Liquidation Estate

[1] "ER" refers to the excerpts of record filed in the court of appeals.

[2] Unless otherwise indicated, all statutory references are to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*

to perform specified activities as the post-confirmation representative of the debtor's estate under 11 U.S.C. § 1123 (b)(3).[3] The Plan further provided that the Official Committee of Creditors Holding Unsecured Claims, appointed by the United States Trustee for the Central District of California in September, 1988, would manage and act as agent for the Liquidation Estate. ER 6, p. 100, § 1.140.

On August 30, 1991, fifteen months after its appointment, the Liquidation Estate commenced an action against Technicolor seeking to avoid as a preferential transfer under Section 547 of the Code a payment in the amount of $3,708,515 that DEG made to Technicolor on July 19, 1988. ER 2. At the close of discovery, the parties filed cross motions for summary judgment. In support of its summary judgment motion, Technicolor asserted, among other arguments, that the Liquidation Estate's complaint was time-barred under Section 546(a)(1)[4] because it was not filed within two years after DEG's Chapter 11 filing.

On December 2, 1992, the Bankruptcy Court entered an order granting the Liquidation Estate's motion, denying Technicolor's motion and entering summary judgment in favor of the Liquidation Estate for $3,708,515, plus

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[3] Section 1123 provides:

> (b) Subject to subsection (a) of this section, a plan may—
>
> . . .
>
> (3) provide for—
>
> . . . .
>
> (B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

11 U.S.C. § 1123(b)(3)(B).

[4] At all times relevant to this case, Section 546(a)(1) required, as explained more fully below, that specified actions be commenced within "two years after the appointment of a trustee under section . . . 1104," or "the time the case is closed or dismissed," whichever is earlier. 11 U.S.C. § 546(a).

pre-judgment interest. ER 12. Technicolor appealed to the district court on December 3, 1992. ER 14. Following oral argument, the district court entered an order on March 3, 1994, reversing the Bankruptcy Court and granting Technicolor's summary judgment solely on the basis of Technicolor's statute of limitations defense. ER 17.

Technicolor's statute of limitations argument relied principally on the Ninth Circuit's decision in *Upgrade Corp. v. Government Technology Services, Inc. (In re Softwaire Centre Int'l, Inc.)*, 994 F.2d 682 (9th Cir. 1993), which held that where no Chapter 11 trustee is appointed to trigger the two-year limitations period, Section 546(a)(1) applies instead to the debtor in possession, requiring that the action be brought within two years after the Chapter 11 petition is filed. Technicolor argued that because no Chapter 11 trustee was ever appointed in this case, the two-year limitations period commenced upon the filing of the Chapter 11 petition and thus the Liquidation Estate's avoidance action was untimely.

The Liquidation Estate appealed the district court's ruling to the Ninth Circuit. The Liquidation Estate argued that the two-year statute of limitations provided in Section 546(a)(1) should not apply at all because no Chapter 11 trustee was ever appointed. Alternatively, the Liquidation Estate argued that, if the statute did apply, the two-year period should commence upon the appointment of the Liquidation Estate, which is the functional equivalent of a Chapter 11 trustee.

The Ninth Circuit affirmed. App. 1a-6a. Bound by its decision in *Softwaire*, the Ninth Circuit held that the two-year limitations period commences upon filing of the Chapter 11 petition if no Chapter 11 trustee is appointed, even though Section 546(a) on its face runs two years after the "appointment of a trustee" or at "the time the case is closed or dismissed." 11 U.S.C. § 546(a).

The Ninth Circuit then rejected the Liquidation Estate's argument that the appointment of an estate representative under Section 1123(b)(3) should commence the two-year limitations period under Section 546(a)(1). Purporting to "focus primarily on the language of the statute," the Ninth Circuit reasoned that the Liquidation Estate, even if functionally equivalent to a Chapter 11 trustee, was not in fact a trustee under Section 546(a)(1). App. 3a. The Ninth Circuit concluded that the limitations period commenced when DEG filed its Chapter 11 petition and that the Liquidation Estate's action was therefore time-barred. App. 6a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision expands an existing conflict among the circuits. Two circuits hold, based on the statute's plain language, that Section 546(a)(1) applies only where a Chapter 11 trustee is appointed. Four circuits depart from the statute's plain language and apply the two-year limitations period to the debtor in possession where no trustee is appointed. This conflict, if not resolved by this Court, will continue to prejudice the statutory rights of creditors, debtors and their representatives in those jurisdictions that have departed from the statute's plain meaning.

I. THE NINTH CIRCUIT'S DECISION EXPANDS AN INTOLERABLE CONFLICT BETWEEN CIRCUITS AS TO HOW TO APPLY SECTION 546(a)

Section 546(a) of the Bankruptcy Code provided, at all times relevant to this case, that:

> An action or proceeding under section 544, 545, 547, 548 or 553 of this title may not be commenced after the earlier of—
>
> (1) two years after the appointment of a trustee under section 702, 1104, 1163, or 1302 of this title [11 U.S.C. § 702, 1104, 1163, or 1302]; or

(2) the time the case is closed or dismissed.

11 U.S.C. § 546(a).[5] The plain language of Section 546(a) states that the statute of limitations for a preference action runs upon one of two events—two years after the appointment of a trustee under one of the specified Code sections or the termination of the entire bankruptcy case.

Two circuits—the Fourth and the Seventh—applying the plain language of Section 546(a), have held that where no trustee is appointed under any of the sections specified in Section 546(a)(1), the limitations period runs, at the earliest, when the case is "closed or dismissed." *Maurice Sporting Goods, Inc. v. Maxway Corp. (In re Maxway Corp.)*, 27 F.3d 980 (4th Cir.), *cert. denied*, 115 S. Ct. 580 (1994); *Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar*, 69 F.3d 799 (7th Cir. 1995).

In *Maxway*, an Official Committee of Unsecured Creditors (the "Committee") was appointed in lieu of a Chapter 11 trustee. The Committee brought an avoidance action more than two years after the Chapter 11 petition was filed, but less than two years after the Committee was appointed. The Bankruptcy Court granted summary judgment in favor of the Committee, and the District Court affirmed.

On appeal to the Fourth Circuit, the defendant argued that the two-year limitations period under Section 546(a) commenced upon filing of the Chapter 11 petition and that the Committee's avoidance action was therefore time-barred. The Fourth Circuit rejected the argument and affirmed the District Court, explaining that,

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[5] Section 546(a) was amended in 1994. As explained below, this amendment does not reduce the impact of the existing circuit split or the need for this Court's review. *See infra* at 11-13.

> [t]he sole function of the courts is to enforce [the statute] according to its terms. Therefore, courts should venture beyond the plain meaning of the statute only in those rare instances in which there is a clearly expressed legislative intent to the contrary, in which a literal application of the statute would thwart its obvious purpose, or in which a literal application of the statute would produce an absurd result.

Maxway, 27 F.3d at 984 (citing *Caminetti v. United States*, 242 U.S. 470 (1917); *Russello v. United States*, 464 U.S. 16 (1983); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982)).

The Fourth Circuit concluded that:

> The language of the statute is clear on its face. It requires that an avoidance action . . . be commenced within two years after the appointment of one of the specified trustees or prior to the close or dismissal of the case, whichever occurs earlier. Under this plain language, the Committee's avoidance action was timely filed because a trustee had not been appointed and the action was commenced prior to the close or dismissal of the case.

Id. at 983.

The Seventh Circuit adopted *Maxway*'s plain-language reading of Section 546(a)(1) in *Gleischman*, 69 F.3d at 800. In an opinion by Judge Easterbrook, the Seventh Circuit agreed with "[t]he straightforward textual argument, which the fourth circuit accepted in *Maxway* . . . that the two-year period begins to run only on 'appointment of a trustee.'" *Id.*[6]

This plain language construction of Section 546(a)(1) is not only rooted in the text of the statute, but also

---

[6] The total amount at stake in *Gleischman* was $17,500 and the defendant did not petition this Court for certiorari to review the Seventh Circuit's decision.

properly recognizes the different roles that the debtor in possession and trustee play in a Chapter 11 proceeding. As the Fourth Circuit observed in *Maxway*:

> [D]ebtors in possession are not likely to commence avoidance actions, if for no other reason, because they are normally more interested in preserving relations with their creditors than in maximizing the size of the estate. [P]ostponing the start of the two-year statute of limitations until the appointment of a trustee who is likely to bring an avoidance action prevents any delay in the commencement of such an action from penalizing unsecured creditors who would benefit from the recovery of a preferential or fraudulent transfer.

27 F.3d at 984.

In contrast, four other circuits—the Second, Third, Ninth and Tenth—have departed from the plain language of Section 546(a) and held that, where no Chapter 11 trustee is appointed, the statute of limitations applies instead to the debtor in possession and the two-year limitations period commences when the Chapter 11 petition is filed. *See United States Brass & Copper Co. v. Caplan (In re Centry Brass Prods., Inc.)*, 22 F.3d 37 (2d Cir. 1994); *Construction Management Servs., Inc. v. Manufacturers Hanover Trust Co. (In re Coastal Group Inc.)*, 13 F.3d 81 (3d Cir. 1994); *Upgrade Corp. v. Government Technology Servs., Inc. (In re Softwaire Centre Int'l, Inc.)*, 994 F.2d 682 (9th Cir. 1993); *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520 (10th Cir. 1990).

These four circuits rely principally on Section 1107(a) of the Code, which provides:

> Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and

> powers, and shall perform all the functions and duties, except the duties specified in sections 1106 (a)(2), (3), and (4) of this title [the investigative duties], of a trustee serving in a case under this chapter.

11 U.S.C. § 1107(a).

Section 1107(a), these circuits assert, contemplates that where no Chapter 11 trustee is appointed, the debtor in possession will serve as the functional equivalent of the trustee and will be subject to the same limits, including statutes of limitations, applicable to the trustee. *See Zilkha*, 920 F.2d at 1523 (there is a "virtual identity of function between a trustee and a debtor in possession"); *Softwaire*, 994 F.2d at 683 ("[Section 1107] places a debtor in possession in the shoes of a trustee in every way."). Thus, these circuits conclude, the two-year limitations period under Section 546(a)(1) begins upon the "appointment" of the debtor in possession, which necessarily occurs at the moment the Chapter 11 petition is filed. 11 U.S.C. §§ 101(13), 1101(1).[7] In effect, these courts have held that the two-year limitations period automatically commences whenever a Chapter 11 petition is filed, but may start over if a Chapter 11 trustee is appointed within two years after that filing. *John Mitchell, Inc. v. Steinbrugge (In re Hanna)*, 72 F.3d 114, 117 (9th Cir. 1995).[8]

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[7] The plain language of Section 546(a)(1), in contrast, reflects Congress's conscious decision *not* to key the running of the statute to the filing of the Chapter 11 petition. Section 1104(a) of the Bankruptcy Code provides that, "[a]t any time *after the commencement of the case but before confirmation of the plan*, the court may, under certain circumstances, order the appointment of a trustee *after notice and a hearing*." 11 U.S.C. § 1104(a) (emphasis added). Thus, by providing that the limitations period commences upon "appointment of a trustee," Congress specifically keyed the statute to events that necessarily occur *after* the petition is filed.

[8] The lower courts have not addressed whether the limitations period restarts if a Chapter 11 trustee is appointed more than two years after the petition is filed.

This inter-circuit conflict over the proper construction of Section 546(a)(1) benefits creditors, debtors and their representatives seeking recovery of preference payments in jurisdictions that apply the plain language of Section 546(a)(1), while severely prejudicing their counterparts in jurisdictions that apply the two-year limitations period to debtors in possession. Thus, a plaintiff in Illinois or North Carolina may obtain full recovery of avoidable preference payments—totaling in many cases, including this one, millions of dollars, while the identical plaintiff in California suing for the same amount on the same ground at the same time receives nothing as a matter of law. This disparate treatment of similarly situated plaintiffs contravenes the certainty, uniformity and fairness in the administration of Chapter 11 estates that Section 546(a) is designed to promote.

II. THE 1994 AMENDMENT OF SECTION 546(a) DOES NOT REDUCE THE IMPACT OF THE EXISTING CIRCUIT SPLIT OR THE NEED FOR REVIEW BY THIS COURT

Section 546(a) was amended in October, 1994. It now provides:

> (a) An action or proceeding under section 544, 545, 547, 548 or 553 of this title may not be commenced after the earlier of—
>
> (1) the later of—
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

For at least two reasons, this amendment of Section 546(a) does not reduce the impact of the existing circuit split or the need for review by this Court. First, there are thousands of bankruptcy proceedings still pending in the lower courts under the pre-amended statute. New Generation Research, Inc., *The 1996 Bankruptcy Yearbook & Almanac* 29 (McHugh & Weiner eds. 1996).[9] This Court's certiorari jurisdiction is predicated upon the fundamental and unassailable assumption that it is intolerable to allow similarly situated litigants in diverse jurisdictions to be treated differently solely on the basis of geography. To be sure, the lack of "prospective" importance occasioned by a change in the law can be a powerful argument against certiorari on an issue that may arise in only a handful of cases. The Court's role is not strictly to correct errors. But this argument is an intolerable excuse to turn a blind eye to the widespread inequitable administration of justice presented by the split in the circuits in this case, which will continue, notwithstanding the 1994 amendment to Section 546(a), to affect scores of cases and tens of millions of dollars.

Indeed, the Court has granted certiorari in cases on issues that without question affected far fewer litigants than the proper interpretation of Section 546(a) will. *See, e.g., Smith v. United States*, 507 U.S. 197 (1993) (whether Antarctica is a "foreign country" within the

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[9] Since the statute was amended, there have been at least six published decisions within the region covered by the Ninth Circuit alone regarding the proper interpretation of pre-amended Section 546(a). *See In re Hanna*, 72 F.3d 114 (9th Cir. 1995); *Mosier v. Kroger Co. (In re IRFM, Inc.)*, 65 F.3d 778 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1848 (1996); *Damir v. Trans-Pacific Nat'l Bank (In re Kong)*, 196 Bankr. 167 (N.D. Cal. 1996); *Witcosky v. Clinical Options, Inc. (In re Allen Care Ctrs., Inc.)*, 182 Bankr. 49 (D. Or. 1995); *General Elec. Capital Auto Lease, Inc. v. Broach (In re Lucas Dallas, Inc.)*, 185 Bankr. 801 (Bankr. 9th Cir. 1995); *England v. Whitney (In re California Canners & Growers)*, 175 Bankr. 346 (Bankr. 9th Cir. 1994).

meaning of the Federal Tort Claims Act).[10] Similarly, the Court has a case pending this Term, *O'Gilvie v. United States*, Nos. 95-966 & 977 (*cert. granted* Mar. 25, 1996), in which the underlying tax statute has been amended to make clear that punitive damage awards are taxable. The Court, however, did not dismiss the writ as improvidently granted after the statute was amended presumably because a large number of such cases still remain to be decided under the old statute.

Second, the amendment does not, in any event, eliminate the existing disagreement in the lower courts over whether the statute may apply to debtors in possession. The amended statute permits the application of Section 546(a)(1)(B), like pre-amended Section 546(a)(1), to a debtor in possession where no "trustee" is appointed. To the contrary, the amendment's Legislative History states that the changes are "not intended to create any negative inference or implication regarding the status of current law or interpretations of section 546(a)(1)." 140 Cong. Rec. H10,767 (Oct. 4, 1994), *reprinted in* Collier Pamphlet Edition, *Bankruptcy Code* 579 (Herzog & King eds. 1996).

The existing disagreement between the circuits under pre-amended Section 546(a)(1) will necessarily spill over into the application of amended Section 546(a)(1)(B) to debtors in possession and will continue the disparate treatment of similarly situated plaintiffs that exists under the pre-amended statute. Plaintiffs in jurisdictions that apply the new statute to debtors in possession will be required to bring their claims, at the latest, two years after the "entry of the order for relief," 11 U.S.C.

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[10] This is not to criticize the grant of certiorari in *Smith*. The case involved a square conflict between two courts of appeals on an issue affecting a tort victim's right to recovery. The point is that a conflict in the circuits should presumptively be reviewed by this Court and only the most compelling reason can justify ignoring the conflict.

§ 546(a)(1)(A), even where a trustee is subsequently appointed. In contrast, plaintiffs in jurisdictions that do not apply the statute to debtors in possession will have, as provided in subsection (B), a full year after the appointment of the "first trustee" to bring their claims. Thus, resolution of the question presented will have both existing and prospective significance. Under these circumstances, the Court should not ignore the conflict among the circuits concerning the proper interpretation of 11 U.S.C. § 546(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 23, 1996

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 94-55432

IN RE DELAURENTIIS ENTERTAINMENT GROUP INC., AND AFFILIATES,

Debtor.

LIQUIDATION ESTATE OF DELAURENTIIS ENTERTAINMENT GROUP,

Plaintiff-Appellant,

v.

TECHNICOLOR, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding
D.C. No. CV 93-01109 RG

Argued, Submission Deferred Sept. 13, 1995
Resubmitted Nov. 27, 1995
Decided June 27, 1996

Before: BROWNING and PREGERSON, Circuit Judges, and TANNER *, District Judge.

* The Honorable Jack E. Tanner, Senior District Judge for the Western District of Washington, sitting by designation.

TANNER, District Judge:

On this appeal, we must decide whether an action to recover a $3.7 million preferential transfer made by DeLaurentiis Entertainment Group, Inc. (DEG) to Technicolor is timely filed under 11 U.S.C. § 546(a)(1)[1] of the Bankruptcy Code when brought by an estate within two years of the estate's appointment, but more than two years after the commencement of the bankruptcy case.

When § 546(s) statute of limitations begins to run is a question we review de novo. *Ford v. Union Bank (In re San Joaquin Roast Beef)*, 7 F.3d 1413, 1414 (9th Cir. 1993).

BACKGROUND

On August 16, 1988, DeLaurentiis Entertainment Group (DEG) filed a Chapter 11 petition in bankruptcy court and continued to operate its affairs as debtor in possession. On May 3, 1990, the court entered an order confirming DEG's plan of reorganization, which provided for the creation and appointment of a Creditor's Committee to act as agent for the debtor's estate under 11 U.S.C. § 1123(b)(3)(B) of the Bankruptcy Code. On August 30, 1991, the Liquidation Estate filed a recovery action under 11 U.S.C. § 547 against Technicolor in the bankruptcy court. The parties filed cross-motions for summary judgment. The bankruptcy court granted summary judgment in favor of the Estate, and denied Technicolor's motion. Technicolor timely appealed. The district court reversed the bankruptcy court and remanded with instructions to dismiss the complaint as time-barred. The

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[1] Section 546(a) was amended in 1994. This case involves the pre-1994 version, which provided:

An action or proceeding under [section 547] of this title may not be commenced after the earlier of—

(1) two years after the appointment of a trustee under [section 702] of this title; or

(2) the time the case is closed or dismissed.

11 U.S.C. § 546(a).

Estate appeals. We have jurisdiction pursuant to 28 U.S.C. § 158(d), and we AFFIRM.

DISCUSSION

Appellant argues that where no Chapter 11 trustee is appointed, the limitations period commences upon the appointment of the nearest functional equivalent of such a trustee, which Appellant claims is the estate representative. Our recent cases indicate, however, that we should focus primarily on the language of the statute to determine whether an estate representative is a "trustee" within the meaning of § 546.

In *Upgrade Corp. v. Government Technology Servs. Inc. (In re Software Centre Int'l, Inc.)*, 994 F.2d 682 (9th Cir.1993), this court considered the application of § 546(a) to debtors in possession. Following the Tenth Circuit's position in *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520, 1523-24 (10th Cir. 1990), we held that a debtor in possession is "the functional equivalent of an appointed trustee" and is subject to a two-year limitations period commencing at the time the petition is filed. *Id.* at 683, *quoting Zilkha*, 920 F.2d at 1524.[2] In neither case was a Chapter 11 trustee appointed. In *San Joaquin Roast Beef*, 7 F.3d 1413 at 1415, a Chapter 11 trustee was appointed over nine months after the debtor in possession filed its bankruptcy petition; the case was later converted to Chapter 7, and the new trustee argued his appointment restarted the limitations period. We held that the statute of limitations runs from appointment of the first trustee, and applies to all subsequent trustees. Subsequently, in *Moiser v. Kroger Co. (In re IRFM, Inc.)* 65 F.3d 778 (9th Cir. 1995), we held that even when no Chapter 11 trustee had ever been appointed, conversion to Chapter 7 did not restart the statute of limitations.

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[2] The *Zilkha* court explained that the statute begins to run when the petition is filed "because the debtor becomes a debtor in possession on that date." *Zilkha*, 920 F.2d at 1524.

These cases, which involved trustees, did not indicate how the statute of limitations should apply to an estate representative. Appellant cites *Iron-Oak Supply Corp. v. Nibco, Inc. (In re Iron Oak Supply Corp.)*, 162 B.R. 301 (Bankr.E.D.Cal.1993) (en banc), for the proposition that an estate representative is the functional equivalent of a trustee.[3] More recently, however, this court and others have focused more on the language of the Bankruptcy Code than on whether a plaintiff is the functional equivalent of a trustee.

In *John Mitchell, Inc. v. Steinbrugge (In re Hanna)*, 72 F.3d 114, 116 (9th Cir.1995), a Chapter 11 trustee brought an avoidance action more than two years after the debtor's Chapter 11 bankruptcy petition was filed. The defendant argued that because the statute of limitations runs from appointment of the "first trustee," and a debtor in possession was the "functional equivalent" of a trustee, the statute did not restart when the Chapter 11 trustee was appointed. We rejected this argument. Viewing our earlier precedents in light of §§ 546 and 1104, we held that although the statute of limitations begins to run when a debtor files his bankruptcy petition, it restarts when a Chapter 11 trustee is appointed.

The Tenth Circuit used this approach in a case involving application of § 546 to an estate representative. In

---

[3] In *Iron-Oak*, the bankruptcy court observed:

> Both the representative and the trustee are third parties possessed of duties and powers that are discrete and readily ascertainable in their essential properties. A representative's duties are prescribed by the plan specifying retention and enforcement of causes of action. A trustee's duties are prescribed by the bankruptcy code. Each exists in a Chapter 11 case by virtue of a specific court order—the order confirming a plan of reorganization and the order approving the appointment of a trustee. Their duties are intended to be performed for the benefit of others. Their tenure is expected to be of limited duration.

Iron-Oak, 162 B.R. at 309.

Starzynski v. Sequoia Forest Industries, 72 F.3d 816, 820-21 (10th Cir.1995), the district court held that it was irrelevant whether an estate representative is the functional equivalent of a trustee; rather, the issue is whether an estate representative is a trustee within the meaning of § 546(a). The Tenth Circuit held:

> There is no basis in the statutory language for re-starting the two-year statute of limitations of § 546 (a)(1) upon appointment of an estate representative under § 1123(b)(3) . . . [T]he statutory language of §§ 546(a), 1107(a) and 1123(b)(3) provides no basis for concluding a non-trustee appointed as an agent representative under § 1123(b)(3) is a trustee within the meaning of § 546(a).

We find the Tenth Circuit's reasoning persuasive. Section 1107(a) confers upon debtors in possession the rights, powers, and duties of trustees. 11 U.S.C. § 1107 (a) (1988). The legislative history of § 1107 also places the debtor in possession in the shoes of the trustee. *See* S.Rep. No. 95-989, 95th Cong., 2nd Sess. 116 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5902 (emphasis added) Thus, § 546(a), read in conjunction with § 1107 (a), affords a debtor in possession two years from the filing of the bankruptcy petition to bring an avoidance action. Neither the plain language of § 546(a) nor the language of § 1104 conveys the same status on estate representatives.

Hanna reads *Softwaire Centre, San Joaquin Roast Beef*, and *IRFM* in conjunction with § 546(a) to hold that if no Chapter 11 trustee is appointed, the limitations period expires two years from the bankruptcy filing, *Hanna*, 72 F.3d at 117; but whenever a Chapter 11 trustee is actually appointed, the rule in *San Joaquin Roast Beef* applies, the statute of limitations restarts, and the trustee gets two years from appointment. *Id.* Thus, under the preamended version of § 546(a), two distinct statute of limitations periods exist for avoidance proceedings.

Because we determine that an estate representative is not a trustee within the meaning of § 546(a), and because no Chapter 11 trustee was ever appointed, the statute of limitations in this case began running on August 16, 1988, the date DEG filed its Chapter 11 bankruptcy petition. The fact that DEG subsequently converted to a Chapter 7 bankruptcy does not start the clock ticking anew. Accordingly, the Liquidation Estate's complaint is time-barred. The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 93-1109 RG

IN RE DE LAURENTIIS ENTERTAINMENT GROUP, INC.,
a Delaware corporation, and affiliates,
Debtors.

Bankruptcy No. LA 88-17251-AA
Chapter 11

LIQUIDATION ESTATE OF DE LAURENTIIS
ENTERTAINMENT GROUP, INC.,
Plaintiff-Appellee,

VS.

TECHNICOLOR, INC., a Delaware corporation,
Defendant-Appellant.

and Related Third-Party Action

(Joint Administration including Cases Nos.
LA 89-11899-AA through
LA 89-11901-AA, inclusive;
LA 89-11904-AA and
LA 89-11907-AA through
LA 89-11912-AA, inclusive)
Adv. No. LA 91-06442-AA

(PROPOSED) ORDER REVERSING SUMMARY JUDGMENT ENTERED BY BANKRUPTCY COURT AND REMANDING WITH DIRECTIONS TO ENTER JUDGMENT FOR APPELLANT DISMISSING COMPLAINT

This court, having considered the briefs submitted by the parties to this appeal, the arguments of counsel, and the record, hereby makes the following findings of fact and conclusions of law:

Findings of Fact

A. DeLaurentiis Entertainment Group, Inc. ("DEG") filed a petition for reorganization relief under chapter 11 of the Bankruptcy Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Central District of California (the "Bankruptcy Court") on August 16, 1988 (the "Petition Date").

B. From the Petition Date until confirmation of DEG's reorganization plan in May, 1990, DEG served as debtor in possession in the chapter 11 case and no trustee was appointed pursuant to 11 U.S.C. § 1104.

C. On May 3, 1990, the Bankruptcy Court entered an order confirming a reorganization plan for DEG. The confirmation order and the plan created the DEG Liquidation Estate, appellee herein (the "Liquidation Estate"). Under the plan, the Liquidation Estate retained certain claims of DEG and its estate, including preference claims, and the DEG Creditors' Committee (the "Committee") was authorized to prosecute such claims on behalf of the Liquidation Estate.

D. On August 30, 1991, more than three years after the Petition Date, the Liquidation Estate filed a complaint in the Bankruptcy Court against Technicolor, Inc., appellant herein ("Technicolor"), under section 547(b) of the

Bankruptcy Code, 11 U.S.C. § 547(b), alleging that a payment in the amount of $3,708,515, made by DEG to Technicolor during the 90-day period prior to the Petition Date, was voidable and thus recoverable under 11 U.S.C. § 550(a)(1).

E. Technicolor filed a timely answer, and the parties thereafter cross-moved for summary judgment. In its motion for summary judgment dismissing the complaint, Technicolor argued, among other things, that the Liquidation Estate's complaint was time-barred under the two-year statute of limitations for avoidance actions set forth in 11 U.S.C. § 546(a)(1).

F. On December 2, 1992, after granting the Liquidation Estate's motion for summary judgment and denying Technicolor's motion, the Bankruptcy Court entered judgment for the Liquidation Estate and against Technicolor, awarding the Liquidation Estate the sum of $3,708,515, plus interest.

G. Technicolor filed a timely appeal. Pursuant to Local Bankruptcy Rule 153, the Liquidation Estate objected to the referral of the appeal to the Bankruptcy Appellate Panel, and the appeal was thereafter transferred to this Court.

Conclusions Of Law

1. The Court has jurisdiction over this appeal pursuant 28 U.S.C. § 158(a) because the Bankruptcy Court's judgment was final.

2. Section 547(b) authorizes a "trustee" to sue to avoid a preference.

3. Section 1107(a) of the Bankruptcy Code provides, in relevant part, that

> [s]*ubject to any limitations on a trustee* serving in a case under this chapter . . . a debtor in possession shall have all the rights . . . and shall perform all

> the functions and duties . . . of a trustee serving in a case under this chapter.

11 U.S.C. § 1107(a) (emphasis added).

4. Section 546(a)(1) of the Bankruptcy Code provides, in relevant part, that

> [a]n action or proceeding under section . . . 547 . . . of [the Bankruptcy Code] may not be commenced after the earlier of—
>
> > (1) two years after the appointment of a trustee under section 702, 1104, 1163, or 1302 or 1202 of this title; or
> >
> > (2) the time the case is closed or dismissed.

11 U.S.C. § 546(a).

5. The two-year limitations period on preference actions in section 546(a)(1) applies to chapter 11 debtors in possession, and begins to run when the chapter 11 case is commenced and the debtor becomes the debtor in possession. *Upgrade Corp. v. Gov't Technology Services, Inc.* (In re Softwaire Centre Int'l, Inc.), 994 F.2d 682, 684 (9th Cir. 1993) ("§ 546(a), when read in light of § 1107(a), was intended to apply to debtors in possession as well as trustees"); *see also* Construction Management Servs., Inc. v. Manufacturers Hanover Trust Co. (In re Coastal Group, Inc.), 1994 U.S. App. LEXIS, 19, *5-9 (3d Cir. Jan. 3, 1994) (same); *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520, 1524-25 (10th Cir. 1990) (same).

6. The Liquidation Estate's complaint was filed more than two years after the commencement of DEG's chapter 11 case. Thus, the two-year limitations period had expired before the complaint was filed, and the action was time-barred.

7. The two-year limitations period did not restart when the Committee was authorized to prosecute preference ac-

tions on behalf of the Liquidation Estate. A creditors' committee is not a trustee, and is appointed under section 1102 of the Bankruptcy Code, 11 U.S.C. § 1102, which is not one of the sections enumerated in section 546 (a)(1). Thus, there is no statutory basis for applying section 546(a)(1) so as to give the Committee an additional period in which to commence a preference action. Accordingly, the two-year period expired two years after the Petition Date.

8. Because this Court concludes that the Liquidation Estate's complaint was time-barred, it is not necessary to consider the other grounds urged by Technicolor for reversal.

In view of the foregoing, it is hereby

ORDERED that the Bankruptcy Court's judgment in favor of the Liquidation Estate is reversed. The case is remanded to the Bankruptcy Court with directions to enter judgment for Technicolor dismissing the complaint for the reasons set forth herein.

Dated: February —, 1994
Los Angeles, California

/s/ Richard A. Gadbois, Jr.
THE HONORABLE
RICHARD A. GADBOIS, JR.
United States District Judge
[3-1-94]

Presented by:

FRANK ROTHMAN
MICHAEL L. COOK
PETER W. CLAPP
KENNETH A. OSTROW
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
300 South Grand Avenue, Suite 3400
Los Angeles, California 90071

By: /s/ Peter W. Clapp
PETER W. CLAPP
Attorneys for Defendant/Appellant
Technicolor, Inc.

CENTRAL DISTRICT OF CALIFORNIA
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action: my business address is 300 South Grand Avenue, Los Angeles, California 90071.

On February 25, 1994 I served the foregoing document(s) described as

(PROPOSED) ORDER REVERSING SUMMARY JUDGMENT ENTERED BY BANKRUPTCY COURT AND REMANDING WITH DIRECTIONS TO ENTER JUDGMENT FOR APPELLANT DISMISSING COMPLAINT

on interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Irving M. Gross, Esq.
Gary E. Klausner, Esq.
Robinson, Diamant, Brill & Klausner
1888 Century Park East
Suite 1500
Los Angeles, California 90067

Perry Landsberg, Esq.
William Archer, Esq.
Sidley & Austin
2049 Century Park East
Suite 3500
Los Angeles, California 90067

Office of the U.S. Trustee
U.S. Department of Justice
3101 Federal Building
300 North Los Angeles Street
Los Angeles, California 90012

* * * *

☒ (BY MAIL IN THE ORDINARY COURSE OF BUSINESS) I am readily familiar with the firms' practice for the correction and processing of correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business: on this date, the above-referenced correspondence was placed for deposit at Los Angeles California and placed for collection and mailing following ordinary business practice, with additional telecopy as noted on service list.

* * * *

☒ I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

Executed on February 25, 1994 at Los Angeles, California

/s/ Julie Brooks
JULIE BROOKS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV 93-1109 RG Date: February 7, 1994

Title: *In re De Laurentiis Entertainment Group, Inc.; Liquidation Estate of De Laurentiis Entertainment Group, Inc. v. Technicolor, Inc.;*

PRESENT:

Hon. Richard A. Gadbois, Jr., Judge

Debra L. O'Neill, Deputy Clerk

PROCEEDINGS:

Defendant/Appellant Technicolor, Inc. filed the above-referenced appeal from the United States Bankruptcy Court for the Central District of California on April 5, 1993.

Having considered the moving and opposition papers and the arguments of Counsel, this Court is determined to REVERSE the decision of the Bankruptcy Court (Bankruptcy No. LA 88 17251-AA).

It is clear from the Ninth Circuit's ruling in *Upgrade Corp. v. Government Technology Servs., Inc.* (*In re Softwaire Centre Int'l., Inc.*), 994 F.2d 682 (9th Cir. 1993), that a debtor-in-possession is the equivalent of a trustee. 994 F.2d at 684. It is likewise clear that a creditor's committee is not. *See* Bankr. Code 11 U.S.C. § 1102.

Therefore, this Court finds that the complaint of Plaintiff/Appellee Official Creditors' Committee as agent for Liquidation Estate of De Laurentiis Entertainment Group, Inc. against Technicolor, Inc. (seeking recovery of $3.7 million as a "voidable transfer"), filed more than two

years after the petition for bankruptcy was filed, is time-barred. Bankr. Code 11 U.S.C. § 546(a); *Upgrade Corp.*, 994 F.2d 682. *See In re Coastal Group, Inc.*, 1994 U.S. App. LEXIS 19 (3d Cir. Jan. 3, 1994); *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520 (10th Cir. 1990).

The Court HEREBY ORDERS counsel for Defendant/Appellant Technicolor, Inc. to prepare and submit a Proposed Order setting forth in detail the reasons this Court reverses the decision of the Bankruptcy Court in Bankruptcy No. LA 88 17251-AA. The order shall be submitted to the Clerk of this Court NO LATER THAN February 15, 1994. Any objections to the form of the proposed order shall be submitted to the Clerk of this Court NO LATER THAN February 22, 1994.

cc: Counsel of Record

Initials of Deputy Clerk /s/ D.L.O'N.

APPENDIX C

[Filed Dec. 1, 1992]

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. LA SS 17251-AA
Chapter 11

IN RE DE LAURENTIIS ENTERTAINMENT GROUP, INC.,
a Delaware corporation, and affiliates,
Debtors.

LIQUIDATION ESTATE OF DE LAURENTIIS
ENTERTAINMENT GROUP, INC.,
Plaintiffs,

v.

TECHNICOLOR, INC., a Delaware corporation,
Defendant.

and Related Third-Party Action

(Joint Administration including Cases Nos.
LA 89-11899-AA through
LA 89-11901-AA, inclusive; and
LA 89-11907-AA through
LA 89-11912-AA, inclusive)
Adv. No. LA 91-06442-AA

ORDER AND SUMMARY JUDGMENT; MEMORANDUM RE CALCULATION OF INTEREST PURSUANT TO LOCAL RULE 116(2)(b)

A motion having been regularly made by the Official Committee of Creditors Holding Unsecured Claims on behalf of the Liquidation Estate of De Laurentiis Entertainment Group, Inc. (the "plaintiff") herein for summary judgment in the plaintiff's favor and against defendant Technicolor, Inc. (the "defendant") in the amount of $3,708,515 plus interest and costs on the grounds that there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment, as a matter of law, that a $3,708,515 pre-petition payment was an avoidable preference under 11 U.S.C. § 547(b).

And a motion having been regularly made by the defendant for summary judgment in the defendant's favor on the grounds that there is no genuine issue as to any material fact and: (1) that the challenged payment to defendant was part of a contemporaneous exchange for new value under 11 U.S.C. § 547(c)(1); (2) that plaintiff's complaint is time-barred under the two year statute of limitations set forth in 11 U.S.C. § 546(a)(1); and (3) that plaintiff is judicially estopped from maintaining the above-captioned adversary proceeding.

Now, on considering the plaintiff's and the defendant's respective opening, opposition and reply memoranda, and the declarations, exhibits and statements of fact and law submitted by both parties; and after hearing counsel for the respective parties, and due deliberation having been had, and the decision of the Court having been filed, and there being no just reason for delay, it is

ORDERED, that plaintiff's motion for summary judgment is in all respects granted and defendant's motion for summary judgment is in all respects denied and it is further

ORDERED, ADJUDGED AND DECREED that final judgment be entered in favor of plaintiff Liquidation Estate of De Laurentiis Entertainment Group, Inc., through the Official Committee of Creditors Holding Unsecured Claims, and against defendant Technicolor, Inc. in the principal amount of $3,708,515 plus costs in the amount of -0- and interest in the amount of $142,864.04 as of November 3, 1992 and $332.24 per day thereafter.

DATED: December 1, 1992

/s/ Alan M. Ahart
ALAN M. AHART
United States Bankruptcy
Court Judge

MEMORANDUM RE CALCULATION OF INTEREST PURSUANT TO LOCAL RULE 116(2)(B)

Pursuant to United States Bankruptcy Court—Central District of California, Local Bankruptcy Rules, Rule 116(2)(b), "[i]f interest is accruing or will accrue on any judgment, decree, or order, the party preparing the proposed form of judgment, decree or order shall indicate by memorandum attached thereto the applicable interest rate as computed under 28 U.S.C. § 1961(a) or 26 U.S.C. § 6621 and the amount of interest to be added for each day the document remains unsigned." Under 28 U.S.C. § 1961(a),

> . . . interest shall be calculated . . . at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of 52-week United States Treasury bills settled immediately prior to the date of the judgment

28 U.S.C. § 1961(a).

That rate, for the week ending November 6, 1992, was 3.27%. Interest on the principal sum of $3,708,515 accruing at that rate totals $121,268.44 per annum or $332.24 per day. At that rate, the total interest accrued from August 30, 1991 (the date the complaint was filed) through November 3, 1992 (the date of the hearing on the Committee's motion for summary judgment) was $142,864.04. Interest shall continue to accrue from that date at the rate of $332.24 per day.

DATED: November 13, 1992

SIDLEY & AUSTIN
PERRY L. LANDSBERG
WILLIAM ARCHER

By: /s/ William Archer
WILLIAM ARCHER
Attorneys for Plaintiff
Liquidation Estate of
De Laurentiis
Entertainment Group, Inc.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2049 Century Park East, Suite 3900, Los Angeles, California 90067.

On November 13, 1992 I served the following document(s) described as:

1. [PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW
2. NOTICE OF ENTRY OF JUDGMENT OR ORDER AND CERTIFICATE OF MAILING (FINDINGS OF FACT AND CONCLUSIONS OF LAW)
3. [PROPOSED] ORDER AND SUMMARY JUDGMENT; MEMORANDUM RE CALCULATION OF INTEREST PURSUANT TO LOCAL RULE 116(2)(B)
4. NOTICE OF ENTRY OF JUDGMENT OR ORDER AND CERTIFICATE OF MAILING (ORDER AND SUMMARY JUDGMENT)

by placing true copy(ies) thereof enclosed in sealed envelope(s) addressed as follows:

Michael L. Cook, Esq.
Peter W. Clapp, Esq.
Linda L. Curtis, Esq.
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
300 S. Grand Avenue, #3400
Los Angeles, Ca. 90071-3144

Linda Bailey, Esq.
Office of the U. S. Trustee
221 N. Figueroa Street, 8th Flr.
Los Angeles, California 90012

Gary E. Klausher, Esq.
Irving M. Gross, Esq.
ROBINSON, DIAMANT, BRILL &
KLAUSNER
1888 Century Park East, #1500
Los Angeles, California 90067

—— — By Hand Delivery

XX — By U.S. Mail

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 13, 1992 at Los Angeles, California.

/s/ Louise Waller
LOUISE WALLER

APPENDIX D

§ 546. Limitations on avoiding powers

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title [11 USCS § 544, 545, 547, 548, or 553] may not be commenced after the earlier of—

(1) two years after the appointment of a trustee under section 702, 1104, 1163, or 1302 of this title [11 USCS § 702, 1104, 1163, or 1302]; or

(2) the time the case is closed or dismissed.

(b) The rights and powers of a trustee under sections 544, 545, and 549 of this title [11 USCS §§ 544, 545, and 549] are subject to any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection. If such law requires seizure of such property or commencement of an action to accomplish such perfection, and such property has not been seized or such action has not been commenced before the date of the filing of the petition, such interest in such property shall be perfected by notice within the time fixed by such law for such seizure or commencement.

(c) Except as provided in subsection (d) of this section, the rights and powers of a trustee under sections 544(a), 545, 547, and 549 of this title [11 USCS §§ 544(a), 545, 547, and 549] are subject to any statutory or common-law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, but—

(1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods before ten days after receipt of such goods by the debtor; and

(2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court—

(A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b) of this title [11 USCS § 503(b)]; or

(B) secures such claim by a lien.

(d) In the case of a seller who is a producer of grain sold to a grain storage facility, owned or operated by the debtor, in the ordinary course of such seller's business (as such terms are defined in section 557 of this title [11 USCS § 557]) or in the case of a United States fisherman who has caught fish sold to a fish processing facility owned or operated by the debtor in the ordinary course of such fisherman's business, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 of this title [11 USCS §§ 544(a), 545, 547, 549] are subject to any statutory or common law right of such producer or fisherman to reclaim such grain or fish if the debtor has received such grain or fish while insolvent, but—

(1) such producer or fisherman may not reclaim any grain or fish unless such producer or fisherman demands, in writing, reclamation of such grain or fish before ten days after receipt thereof by the debtor; and

(2) the court may deny reclamation to such a producer or fisherman with a right of reclamation that has made such a demand only if the court secures such claim by a lien.

(e) Notwithstanding sections 544, 545, 547, 548(a)(2), and 548(b) of this title [11 USCS §§ 544, 545, 547, 548(a)(2), (b)], the —trustee may not avoid a transfer that is a margin payment, as defined in section 741(5) or 761(15) of this title [11 USCS § 741(5) or 761(15)], or settlement payment, as defined in section 741(8) of

this title [11 USCS § 741(8)], made by or to a commodity broker, forward contract merchant, stockbroker[,] financial institution, or securities clearing agency, that is made before the commencement of the case, except under section 548(a)(1) of this title [11 USCS § 548(a)(1)].

(f) Notwithstanding sections 544, 545, 547, 548(a)(2), and 548(b) of this title [11 USCS §§ 544, 545, 547, 548(a)(2), (b)], the trustee may not avoid a transfer that is a margin payment, as defined in section 741(5) or 761(15) of this title [11 USCS § 741(5) or 761(15)], or settlement payment, as defined in section 741(8) of this title [11 USCS § 741(8)], made by or to a repo participant, in connection with a repurchase agreement and that is made before the commencement of the case, except under seciton 548(a)(1) of this title [11 USCS § 548(a)(1)].

(Nov. 6, 1978, P.L. 95-598, Title I, § 101, 92 Stat. 2597; July 27, 1982, P. L. 97-222, § 4, 96 Stat. 236; July 10, 1984, P. L. 98-353, Title III, Subtitle B, § 351, Subtitle F, § 393, Subtitle H, § 461, 98 Stat. 358, 365, 377.)

[As amended October 1994]

§ 546. Limitations on avoiding powers

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—

(1) the later of—

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or

(2) the time the case is closed or dismissed.

(b)(1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that—

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or

(B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

(2) If—

(A) a law described in paragraph (1) requires seizure of such property or commencement of an action to accomplish such perfection, or

maintenance or continuation of perfection of an interest in property; and

(B) such property has not been seized or such an action has not been commenced before the date of the filing of the petition;

such interest in such property shall be perfected, or perfection of such interest shall be maintained or continued, by giving notice within the time fixed by such law for such seizure or such commencement.

(c) Except as provided in subsection (d) of this section, the rights and powers of a trustee under sections 544(a), 545, 547, and 549 of this title [11 USCS §§ 544(a), 545, 547, and 549] are subject to any statutory or common-law right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to reclaim such goods if the debtor has received such goods while insolvent, but—

(1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods—

(A) before 10 days after receipt of such goods by the debtor; or

(B) if such 10-day period expires after the commencement of the case, before 20 days after receipt of such goods by the debtor; and

(2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if the court—

(A) grants the claim of such a seller priority as a claim of a kind specified in section 503(b) of this title [11 USCS § 503(b)]; or

(B) secures such claim by a lien.

(d) In the case of a seller who is a producer of grain sold to a grain storage facility, owned or operated by the

debtor, in the ordinary course of such seller's business (as such terms are defined in section 557 of this title [11 USCS § 557]) or in the case of a United States fisherman who has caught fish sold to a fish processing facility owned or operated by the debtor in the ordinary course of such fisherman's business, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 of this title [11 USCS §§ 544(a), 545, 547, 549] are subject to any statutory or common law right of such producer or fisherman to reclaim such grain or fish if the debtor has received such grain or fish while insolvent, but—

(1) such producer or fisherman may not reclaim any grain or fish unless such producer or fisherman demands, in writing, reclamation of such grain or fish before ten days after receipt thereof by the debtor; and

(2) the court may deny reclamation to such a producer or fisherman with a right of reclamation that has made such a demand only if the court secures such claim by a lien.

(e) Notwithstanding sections 544, 545, 547, 548(a)(2), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency, that is made before the commencement of the case, except under section 548(a)(1) of this title.

(f) Notwithstanding sections 544, 545, 547, 548(a)(2), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, made by or to a repo participant, in connection with a repurchase agreement and that is made before the commencement of the case, except under section 548(a)(1) of this title.

(g) Notwithstanding sections 544, 545, 547, 548(a)(2) and 548(b) of this title, the trustee may not avoid a transfer under a swap agreement, made by or to a swap participant, in connection with a swap agreement and that is made before the commencement of the case, except under section 548(a)(1) of this title.

[(h)](g) Notwithstanding the rights and powers of a trustee under sections 544(a); 545, 547, 549, and 553, if the court determines on a motion by the trustee made not later than 120 days after the date of the order for relief in a case under chapter 11 of this title [11 USCS §§ 1101 et seq.] and after notice and a hearing, that a return is in the best interests of the estate, the debtor, with the consent of a creditor, may return goods shipped to the debtor by the creditor before the commencement of the case, and the creditor may offset the purchase price of such goods against any claim of the creditor against the debtor that arose before the commencement of the case.

(As amended Oct. 27, 1986, P. L. 99-554, Title II, Subtitles B, C, §§ 257(d), 283(1), 100 Stat. 3114, 3117; June 25, 1990, P.L. 101-311, Title I, § 103, Title II, § 203, 104 Stat. 268, 269; Oct. 22, 1994, P. L. 103-394, Title II, §§ 204(b), 209, 216, 222(a), Title V, § 501(b)(4), 108 Stat. 4122, 4125, 4126, 4129, 4142.)

Supreme Court, U.S.
FILED
OCT 24 1996
CLERK

No. 96-460

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

LIQUIDATION ESTATE OF
DE LAURENTIIS ENTERTAINMENT GROUP INC.,
Petitioner,
v.
TECHNICOLOR, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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October 24, 1996

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26 pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Section 547(b) of the United States Bankruptcy Code, 11 U.S.C. § 547(b), authorizes a "trustee" to sue to avoid a preferential transfer. Section 1107(a) of the Code provides that a "debtor in possession" (*i.e.*, the debtor in a chapter 11 case in which no trustee has been appointed) has (with certain exceptions) all the powers of a trustee, "subject to any limitations on a trustee."

Before October 22, 1994, former 11 U.S.C. § 546(a) (applicable here) imposed a two-year statute of limitations on preference actions, running from the date of the trustee's appointment. The question presented is whether, under former § 546(a), a debtor in possession seeking to avoid a preference was subject to the same two-year limitations period imposed on a trustee, or whether there was no statute of limitations for preference actions in chapter 11 cases unless a trustee was appointed.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The following is a list of all parent companies and nonwholly-owned subsidiaries of Respondent Technicolor, Inc.:

1. Carlton Communications plc
2. Carlton Electronics Limited
3. Carlton U.S. Investments Limited
4. New CCI, Inc.

In addition, Revlon Group Incorporated, the former parent company of Respondent Technicolor, Inc., has an interest in the outcome of this matter. The following is a list of all parent companies, affiliates, and subsidiaries of Revlon Group Incorporated that have issued shares to the public:

1. The Coleman Company, Inc.
2. Consolidated Cigar Holdings Inc.
3. Laboratory Corporation of America Holdings, Inc.
4. Mafco Consolidated Group Inc.
5. Marvel Entertainment Group, Inc.
6. Meridian Sports Incorporated
7. New World Communications Group Incorporated
8. Power Control Technologies Inc.
9. Revlon, Inc.
10. Toy Biz, Inc.

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STATUTES INVOLVED

The statutes involved in this matter are: the current and former versions of 11 U.S.C § 546(a), 11 U.S.C. § 547(b), and 11 U.S.C § 1107(a).

The texts of former and current § 546(a) are reproduced on the first page of Appendix A. The texts of §§ 547(b) and 1107(a) appear on the following pages of Appendix A.

No. 96-460

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

LIQUIDATION ESTATE OF
DE LAURENTIIS ENTERTAINMENT GROUP INC.,
Petitioner,
v.
TECHNICOLOR, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Technicolor, Inc. ("Technicolor") submits this opposition to the petition for writ of certiorari, filed by the Liquidation Estate of De Laurentiis Entertainment Group, Inc. ("Petitioner"), to review the decision of the United States Court of Appeals for the Ninth Circuit, reported at 87 F.3d 1061 (9th Cir. 1996). Congress in 1994 amended the statute that led to the circuits' conflict, eliminating all ambiguity on the limited issue presented here. Since the amendment, the Court has twice declined to

address the identical issue.[1] Review of the former statute at this time is not necessary to prevent future conflict, and is not otherwise warranted.

COUNTERSTATEMENT OF THE CASE

A. The Parties

Respondent Technicolor is a film laboratory, furnishing film processing and laboratory services to the motion picture industry. These services include the preparation of "release prints," from a film negative and a soundtrack, for exhibition to the public.

In 1986, Technicolor and certain affiliates entered into a "Laboratory Services Agreement" with De Laurentiis Entertainment Group, Inc. ("DEG"), under which Technicolor agreed to perform laboratory services for DEG. The agreement contained standard provisions granting Technicolor a lien on all DEG "Film Materials" in its possession, so that if DEG defaulted, Technicolor could retain the Film Materials until it was paid in full.

B. The Parafrance Transaction

In 1988, DEG agreed to sell substantially all the foreign distribution rights to its film library to Parafrance, S.A. ("Parafrance") for a purchase price of approximately $56.5 million. As a condition, Parafrance demanded that DEG obtain "Laboratory Access Letters" from Technicolor, to insure that Technicolor would provide release prints to Parafrance and would not assert its lien on the Film Materials on account of any amounts owed by DEG. Technicolor

---

[1] *Maurice Sporting Goods, Inc. v. Maxway Corp. (In re Maxway Corp.)*, 27 F.3d 980 (4th Cir.), *cert. denied*, 115 S. Ct. 580 (1994); *Mosier v. Kroger Co. (In re IRFM, Inc.)*, 65 F.3d 778 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1848 (1996).

agreed to provide the requested Laboratory Access Letters upon receipt of the $3.7 million then owed to it by DEG.

The Parafrance sale closed on June 18, 1988. Parafrance paid Technicolor the amount owed to it directly, and Technicolor issued the requested letters, releasing its lien on the Film Materials with respect to any amounts then owed by DEG.

C. DEG's Chapter 11 Case and This Preference Action

DEG commenced its chapter 11 case on August 16, 1988. It operated as a debtor in possession under 11 U.S.C. § 1107(a) throughout its case; no trustee was appointed. In May, 1990, the bankruptcy court confirmed a liquidating plan, proposed by DEG with its Creditors' Committee's support. The plan created a "Liquidation Estate" and authorized the Committee to act as the Estate's representative.

The Committee commenced this action by filing a complaint in the bankruptcy court on August 30, 1991 — more than one year after DEG's plan was confirmed and more than three years after DEG's chapter 11 case commenced. The complaint alleged that the $3.7 million payment to Technicolor — in exchange for Technicolor's release of its lien on the Film Materials and its delivery of the Laboratory Letters — was voidable as a preference under 11 U.S.C. § 547(b).

In discovery, the Committee acknowledged that it had learned of the payment to Technicolor when it was formed in 1988. Neither DEG's plan or disclosure statement, however, had referred to the potential claim against Technicolor.

In its answer, Technicolor contended that the complaint was time-barred under the version of 11 U.S.C. § 546(a)(1) then in effect. Technicolor also argued that the payment it received from Parafrance was not avoidable because Technicolor's release of its lien constituted "a contemporaneous

exchange for new value" within the meaning of 11 U.S.C. § 547(c)(2), and finally that the Committee should be judicially estopped from prosecuting the claim because it was not disclosed in the plan or disclosure statement.

D. The Opinions Below

The bankruptcy court granted the Estate's summary judgment motion and denied Technicolor's summary judgment motion in December, 1992. In March, 1994, the district court reversed, holding that the complaint was timebarred. The district court relied on the Ninth Circuit's intervening decision in *Upgrade Corp. v. Government Technology Servs., Inc. (In re Softwaire Centre Int'l, Inc.)*, 994 F.2d 682 (9th Cir. 1993). There, the Ninth Circuit had held that the two-year statute of limitations on preference actions, imposed by former 11 U.S.C. § 546(a)(1), applied in chapter 11 cases and began to run when the case was commenced. The district court expressly declined to rule on the other grounds for reversal urged by Technicolor.

In June, 1996, the United States Court of Appeals for the Ninth Circuit affirmed, based on its earlier decision in *Softwaire Centre*. Because it held that the action was timebarred, it also did not consider Technicolor's other defenses.

E. Congress Amends the Statute

On October 22, 1994, President Clinton signed into law the Bankruptcy Reform Act of 1994 (the "Reform Act"),[2] one provision of which amended 11 U.S.C. § 546(a). New § 546(a) provides explicitly that in chapter 11 cases, the two-year statute of limitations on preference and other avoidance actions begins running when the case is commenced. If a trustee is appointed during the two-year period,

---

[2]Pub. L. No. 103-394, 108 Stat. 4106 (1994).

the limitations period runs to the later of the end of the two-year period or one year after the trustee's appointment.

Thus, for chapter 11 cases commenced on or after October 22, 1994, new § 546(a) resolves in the affirmative the limited issue here: whether the two-year limitations period applies to actions brought by debtors in possession.

REASONS FOR DENYING THE WRIT

I.

The 1994 Amendment to § 546(a) Resolves the Statute of Limitations Issue and Obviates the Need To Address the Conflict

Petitioner asks the Court to address a conflict based on former Bankruptcy Code § 546(a), a provision that Congress amended two years ago and that — in its prior form — affects a dwindling number of cases today. This Court has historically declined to address non-Constitutional conflicts that Congress has resolved. This is precisely such a case.[3]

---

[3] As the Court noted in *Braxton v. United States*, 500 U.S. 344 (1991):

> A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals . . . . With respect to federal law apart from the Constitution, we are not the sole body that could eliminate such conflicts, at least as far as their continuation into the future is concerned. *Obviously, Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute* . . . .

500 U.S. at 347-48 (emphasis added). In *Braxton*, having granted certiorari, the Court declined to address an intercircuit conflict regarding federal Sentencing Guidelines because the United States Sentencing Commission had decided to consider the issue and the case could be decided on other grounds. *Id.* at 348-49. *See also* 13 James WM. Moore et al., *Moore's Federal Practice* ¶ 810.21 at SC10-23 (2d ed. 1996) ("[T]he Court will not be inclined to grant certiorari to resolve a conflict among appellate courts . . . that is unlikely to recur. Take, for

The Estate correctly notes that the courts of appeals issued conflicting decisions over the application of former § 546(a)'s two-year statute of limitations in chapter 11 cases. Four circuits (including the court below) held that the two-year period applied to chapter 11 debtors in possession, and began to run when the chapter 11 case was commenced.[4] Two circuits disagreed, holding that unless a trustee was appointed, there was no statute of limitations for preference actions in chapter 11 cases.[5]

For cases commenced on or after October 22, 1994, however, there can be no dispute. On that date, the Reform Act became law. It amended § 546(a) to remove any possible ambiguity; as amended, the section reads:

> (a) An action or proceeding under section 544, 545, 547, 548 or 553 of this title [*e.g.*, a preference action] may not be commenced after the earlier of —
>
> (1) the later of —
>
> (A) 2 years after the entry of the order for relief; or
>
> (B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163,

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example, a conflict that arises over a statute that has been repealed . . . .").

[4] *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520 (10th Cir. 1990); *Upgrade Corp. v. Government Technology Servs., Inc. (In re Softwaire Centre Int'l, Inc.)*, 994 F.2d 682 (9th Cir. 1993); *Construction Management Servs., Inc. v. Manufacturers Hanover Trust Co. (In re Coastal Group Inc.)*, 13 F.3d 81 (3d Cir. 1994); *United States Brass & Copper Co. v. Caplan (In re Century Brass Prods., Inc.)*, 22 F.3d 37 (2d Cir. 1994).

[5] *Maurice Sporting Goods, Inc. v. Maxway Corp. (In re Maxway Corp.)*, 27 F.3d 980 (4th Cir.), *cert. denied*, 115 S. Ct. 580 (1994); *Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar*, 69 F.3d 799 (7th Cir. 1995).

> 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
>
> (2) the time the case is closed or dismissed.

11 U.S.C. § 546(a).

In a voluntary bankruptcy case (whether under chapter 7, 11, 12, or 13), the "order for relief" is the filing of the bankruptcy petition.[6] In an involuntary case, the bankruptcy court enters a separate order for relief.[7] Thus, under current law the two-year period applies in chapter 11 cases, and begins to run when the petition is filed (in a voluntary case), or when the order for relief is entered (in an involuntary case). If a trustee is appointed during the two-year period, the period runs to the later of the end of the two years or one year after the trustee's appointment.

Any decision by this Court as to the application of the former statute, therefore, will not implicate present law or have any effect on future cases. The issue does not raise Constitutional concerns, and the other grounds in Supreme Court Rule 10 for granting certiorari do not apply. Accordingly, the writ should be denied.

---

[6] 11 U.S.C. § 301 ("A voluntary case under a chapter of this title is commenced by the filing of a petition with the bankruptcy court under such chapter.... The commencement of a voluntary case under a chapter... constitutes an order for relief under such chapter").

[7] 11 U.S.C. § 303(h) (explaining circumstances under which bankruptcy court will "order relief" against debtor in an involuntary case).

II.

The Few Pending Cases in Which the Issue May Arise Do Not Warrant Granting the Writ

Most provisions of the Reform Act, including its amendment of § 546(a), apply only in bankruptcy cases commenced on or after the date of its enactment (October 22, 1994).[8] Accordingly, there may be pending pre-October, 1994 chapter 11 cases — like the *De Laurentiis* case here — in which preference litigation may be determined by the interpretation of former § 546(a). This possibility, however, does not warrant granting the Petition, for at least two reasons.

First, the number of cases in which the issue may arise diminishes daily. The Petition misleadingly refers to the "thousands of bankruptcy proceedings still pending in the lower courts under the pre-amended statute."[9] Most of these bankruptcy cases, however, are liquidations under chapter 7, in which this issue cannot arise. The Petition's subsequent suggestion that the issue may affect "scores of cases and tens of millions of dollars" can only be speculation.[10]

---

[8]Reform Act § 702.

[9]Petition at 11.

[10]*Id.* The Petition cites New Generation, Inc., *The 1996 Bankruptcy Yearbook & Almanac* (McHugh & Weiner eds. 1996) for its reference to the "thousands" of cases still pending under the old statute. The chart on page 29 of that volume, however, does not show how many pending cases predate 1994, or how many are chapter 11 cases. The chart on page 9 of the same volume shows that over the past few years, chapter 11 cases have barely constituted 2% of all bankruptcy cases filed. There is nothing to indicate the number or dollar amount of preference proceedings in pending pre-1994 chapter 11 cases.

Copies of these pages from *The 1996 Bankruptcy Yearbook & Almanac* are attached hereto as Appendix B.

There is a more important reason why this issue should seldom arise, even in pre-1994 cases. The first reported appellate decision applying former § 546(a)'s two-year limitations period in chapter 11 cases was the 10th Circuit's *Zilkha* decision, decided in December, 1990.[11] After *Zilkha*, careful bankruptcy practitioners in other circuits — even where the issue was undecided — regularly advised their clients (debtors or creditors' committees) to commence preference actions within the two-year period.

Thus, this issue will arise only in chapter 11 cases commenced before October 22, 1994, in which viable preference claims exist and where counsel failed to advise the debtor or creditors' committee of the two-year limitation period. This Court's review of the issue is not warranted under these circumstances, especially because its decision will have no impact whatsoever on future litigation.

III.

There Is No Risk of Misinterpretation of the New Statute

Petitioner wrongly suggests that the existing split in the circuits regarding former § 546(a) may somehow be replicated in the application of the new statute:

> The existing disagreement between the circuits under pre-amended Section 546(a)(1) will necessarily spill over into the application of amended Section 546(a)(1)(B) to debtors in possession .... Plaintiffs in jurisdictions that apply the new statute to debtors in possession will be required to bring their claims, at the latest, two years after the "entry of the order for relief," 11 U.S.C. § 546(a)(1)(A), even

---

[11] *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520 (10th Cir. 1990). An earlier reported bankruptcy court decision had reached the same result. *Lill v. Bricker (In re Lill)*, 116 B.R. 543, 546 (Bankr. N.D. Ohio 1990).

> where a trustee is subsequently appointed. In contrast, plaintiffs in jurisdictions that do not apply the statute to debtors in possession will have, as provided in subsection (B), a full year after the appointment of the "first trustee" to bring their claims.[12]

This suggestion is meritless. The new statute could not be more clear: the action may be not be brought — by a debtor in possession or anyone else — more than two years after the entry of the order for relief, unless a trustee has been appointed within that two-year period, in which case the limitations period runs to the later of the end of the two years or one year after the trustee's appointment. There can be no "jurisdictions that do not apply the statute to debtors in possession," as Petitioner suggests in the quote above. By its terms, the statute (like all statutes of limitations) applies to every plaintiff. No future conflict can arise on this point.

For chapter 11 cases commenced on or after October 22, 1996, Congress has resolved in the affirmative the issue here — § 546(a)'s two-year limitations period *does* begin to run with the commencement of the case. Lower courts have acknowledged that the issue cannot reemerge under current law.[13] Accordingly, no present ambiguity on this issue warrants the Court's review of the former statute.

---

[12] Petition at 12.

[13] *See Gleischman Sumner Co. v. King, Weiser, Edelman & Bazar*, 69 F.3d 799, 800 (7th Cir. 1995) (because of 1994 amendment, "[t]he question [the interpretation of former § 546(a)] has no prospective significance").

CONCLUSION

The amendment to 11 U.S.C. § 546(a) has resolved the question presented here for all cases commenced on or after October 22, 1994. Thus, any decision by this Court would have no prospective significance. And the number of cases involving former § 546(a)(1) is of necessity limited, both because of the passage of time and because, since 1990, bankruptcy practitioners have been on notice that a two-year limitations period might apply in chapter 11.

Under these circumstances, the Court need not expend its efforts to resolve conflicting interpretations of prior law. The writ should be denied.

Dated: October 24, 1996

Respectfully submitted,

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APPENDIX A

11 U.S.C. § 546(a)

Former Section 546(a) (before October 22, 1994)	Current Section 546(a) (on and after October 22, 1994)
§ 546. *Limitations on avoiding powers*	§ 546. *Limitations on avoiding powers*
(a) An action or proceeding under section 544, 545, 547, 548 or 553 of this title may not be commenced after the earlier of -	(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of -
(1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or	(1) the later of -
	(A) 2 years after the entry of the order for relief; or
	(B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
(2) the time the case is closed or dismissed.	(2) the time the case is closed or dismissed.
. . .	. . .

11 U.S.C. § 547(b)

§ 547. Preferences

. . .

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of any interest of the debtor in property -

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made -

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider, and

(5) that enables such creditor to receive more than such creditor would receive if -

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

. . .

11 U.S.C. § 1107(a)

§ 1107. Rights, powers, and duties of debtor in possession

(a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2),(3), and (4) of this title, of a trustee serving in a case under this chapter.

. . .

APPENDIX B

The 1996 Bankruptcy Yearbook & Almanac

Editor: Christopher M. McHugh
Associate Editor: Courtney E. Weiner
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Bankruptcy Filings by Chapter

1980 - 1995

Year	Total	Chap.7	Chap.11	Chap.12	Chap.13
1980	331,098	249,136	6,348		75,584
1981	363,847	260,664	10,041		93,139
1982	380,212	257,644	18,821		103,738
1983	348,872	234,594	20,252		94,021
1984	348,488	234,997	20,252		93,221
1985	412,431	280,986	23,374		108,059
1986	530,008	374,452	24,740	601	130,200
1987	574,849	406,761	19,901	6,078	142,065
1988	613,606	437,882	17,690	2,034	155,969
1989	679,980	476,993	18,281	1,440	183,228
1990	782,960	543,334	20,783	1,346	217,468
1991	943,987	656,460	23,989	1,495	262,006
1992	971,517	681,663	22,634	1,608	265,577
1993	875,202	602,980	19,174	1,243	251,773
1994	832,829	567,240	14,773	900	249,877
1995	926,601	626,150	12,904	926	286,588

(Notes: Chapter 12 did not begin until 1986. "Total" includes small numbers of other Chapter and Sub-Chapter filings.)

Minor Chapters and Sections of the Bankruptcy Code

Year	Ch. 9	Sec. 304	Ch. 7 Stock Broker	Ch. 11 Railroad	Ch. 7 Commodity Broker
1982	3	1	2	1	2
1983	2	1	0	1	1
1984		(Data for 1984 not available)			
1985	3	4	1	2	2
1986		(Data for 1986 not available)			
1988	5	11	10	4	0
1989	9	28	1	0	0
1990	13	7	7	2	0
1991	18	15	3	0	0
1992	14	21	0	0	0
1993	12	19	0	0	0
1994	16	23	0	0	0
1995	10	23	0	0	0

Bankruptcies Pending

Year	Filings	Terminations	Pending	% change in Pending
1985	412,510	350,257	658,953	...
1986	530,438	413,763	775,628	17.7
1987	578,012	543,205	810,435	4.5
1988	613,465	582,206	841,694	3.9
1989	679,461	594,717	909,159	8.0
1990	782,960	658,889	1,030,443	13.3
1991	943,987	782,141	1,192,281	15.7
1992	971,517	936,330	1,216,546	2.0
1993	875,202	935,438	1,156,310	-5.0
1994	832,829	860,793	1,122,470	-2.9
1995	926,601	913,502	1,119,324	-0.3

No. 96-460

(3)

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LIQUIDATION ESTATE OF
DE LAURENTIIS ENTERTAINMENT GROUP INC.,
Petitioner,

v.

TECHNICOLOR, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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Respondent concedes that the circuits have "issued conflicting decisions" as to the proper application of pre-amended Section 546(a), and that the outcome of numerous avoidance actions brought in "pending pre-October, 1994 chapter 11 cases. . . may be determined" by the interpretation of former § 546(a). Respondent's Br. at 6, 8. These reasons alone warrant granting the Petition.

Respondent nonetheless asserts that certiorari should be denied because the 1994 amendment eliminates any ambiguity, and therefore any conflict, as to the proper application of the statute. Both the plain language and the legislative history of the 1994 amendment demonstrate that this assertion is incorrect.

Pre-amended Section 546(a) required an action to be brought within "two years after the appointment of a *trustee* . . . ," or before "the time the case is closed or

dismissed," whichever occurs earlier. 11 U.S.C. § 546(a); Petition at 5 (emphasis added). The word "trustee" is unchanged in the amended version of Section 546(a), which respondent conveniently ignores. As explained in the Petition, the circuits disagree over the proper construction of the word "trustee." Petition at 6-9.

Viewing the debtor in possession as the "functional equivalent" of a trustee, the Second, Third, Ninth and Tenth Circuits hold that the term "trustee" in pre-amended Section 546(a)(1) should be read to include the debtor in possession if no actual trustee has been appointed. Petition at 8-9. The effect of this construction is to require that an avoidance action be brought within two years after the "appointment of" the debtor in possession—i.e., within two years after the Chapter 11 petition is filed. 11 U.S.C. § 546(a)(1); Petition at 8-9.

In contrast, the Fourth and Seventh Circuits, applying the plain language of Section 546(a)(1), have held that the term "trustee" *cannot* be read to include the debtor in possession. Petition at 6-7. The effect of the Fourth and Seventh Circuits' construction where no actual trustee is appointed is not, as respondent suggests, to impose "no statute of limitations for preference actions," Respondent's Br. at i, but rather to require that an action be brought any time before the Chapter 11 case is "closed or dismissed." 11 U.S.C. § 546(a)(2); Petition at 6-7.

Amended Section 546(a)(1), which allows an action to be brought either "2 years after entry of the order for relief," or "1 year after the appointment or election of the *first trustee* . . . ," whichever is later, does not resolve this conflict. 11 U.S.C. § 546(a)(1) (emphasis added). Nothing in amended Section 546(a)(1) precludes the Second, Third, Ninth and Tenth Circuits from continuing to hold that the debtor in possession is the "first trustee." Indeed, the legislative history of the amendment states that the changes are "not intended to create any negative inference or implication regarding the status of current law or interpretations of section 546(a)(1)." 140 Cong. Rec. H10,767 (Oct. 4, 1994), *reprinted in*

Collier Pamphlet Edition, *Bankruptcy Code* 579 (Herzog & King eds. 1996) (statement of Rep. Brooks) (emphasis added).

This disagreement over the proper construction of the word "trustee" will continue to cause disparate treatment of similarly situated plaintiffs. Plaintiffs in the four circuits that construe "first trustee" to include the debtor in possession will be required to bring their claims, at the latest, two years after the "entry of the order for relief," 11 U.S.C. § 546(a)(1)(A), even if an actual trustee is appointed within that two-year period. In contrast, plaintiffs in the two circuits that do not construe "first trustee" to include the debtor in possession will have, as provided in subsection (a)(1)(B) of the amended statute, up to three years to assert their claims—i.e., one year after the appointment of the "first trustee" appointed during the first two years of the case. Petition at 12-13.

Finally, in arguing that "[n]o future conflict can arise on this point" under the new statute, Respondent's Br. at 10, respondent has effectively conceded that the Fourth and Seventh Circuits' plain-meaning construction of the pre-amended statute is correct, and that respondent's consistent assertion to the contrary is incorrect:

> The new statute could not be more clear: the action may not be brought—by a debtor in possession or anyone else—more than two years after the entry of the order for relief, unless a *trustee* has been appointed within that two-year period, in which case the limitations period runs to the later of the end of the two years or one year after the *trustee's* appointment.

Respondent's Br. at 10 (emphasis added). By asserting that the wording of the new statute "could not be more clear," respondent has, in effect, acknowledged that the term "trustee," whether in the amended or pre-amended statute, cannot reasonably be construed to mean "debtor in possession," and that the rule applied in the Second, Third, Ninth and Tenth Circuits is contrary to the plain language of Section 546(a).

In sum, allowing the existing conflict to continue undermines the fair administration of the law by allowing geography alone to decide the outcome of cases involving millions of dollars. Respondent merely points out the obvious —the number of cases is finite and shrinking. The same is unquestionably true in *O'Gilvie v. United States*, Nos. 95-966 & 977 (argued Oct. 9, 1996), but that has not deterred this Court from resolving the circuit conflict presented in that case where the statute has been amended to eliminate the issue completely in future cases. By contrast, here, a decision by this Court concerning the proper interpretation of the word "trustee" not only will resolve an issue that affects potentially thousands of cases now pending, but also will have prospective significance. Accordingly, the Court should decide the question presented here, both to resolve the pre-amendment conflict among the circuits and to provide guidance to courts deciding post-amendment cases as to whether the term "trustee" should be construed literally, as petitioner urges and two courts of appeals have held, or functionally, as four circuits have concluded.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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